
CHAPTER 21

INTERNATIONAL MEASURES TO PREVENT AND SUPPRESS THE FINANCING OF TERRORISM

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A. INTRODUCTION

The attacks of September 11, 2001 highlighted both the issue of international terrorism in general and the financing of international terrorism in particular. Even before 9/11 the international community was engaged in problems caused by international terrorism through a series of multi-lateral treaties—both universal¹

¹ See, for example, the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on September 14, 1963; the Convention for the Suppression of the Unlawful Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation concluded at Montreal on September 23, 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, adopted by the United Nations General Assembly on December 14, 1973; the International Convention against the Taking of Hostages, adopted by the United Nations General Assembly on December 17, 1979; the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on October 26, 1979; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation done at Montreal on September 23, 1971, done at Montreal on February 24, 1988; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988; the Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on March 1, 1991; and the International Convention for the

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and regional²—directed at the specific types of criminal activity favored by terrorists and through the adoption—without a vote—of two comprehensive declarations by the U.N. General Assembly in 1994³ and 1996⁴ aimed at eliminating international terrorism in all its manifestations.⁵

The importance of starving terrorists of funding was also acknowledged prior to 9/11 with the adoption, by the U.N. General Assembly, of the International Convention for the Suppression of the Financing of Terrorism on December 9, 1999. Although there are presently 132 parties to the International Convention for the Suppression of the Financing of Terrorism,⁶ by September 11, 2001,

Suppression of Terrorist Bombings, adopted by the United Nations on December 15, 1997.

² See, for example, the OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Forms of Extortion that are of International Significance, concluded at Washington DC on February 2, 1971; the European Convention on Terrorism, done at Strasbourg on January 27, 1977; the South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism, signed at Kathmandu on November 4, 1987; the Arab Convention on the Suppression of Terrorism, signed at Cairo on April 22, 1998; the Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, done at Minsk on June 4, 1999; the Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted at Ouagadougou on July 1, 1999; and the OAU Convention on the Prevention and Combating of Terrorism, adopted at Algiers on July 14, 1999.

³ Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60, Dec. 9, 1994, U.N. Doc A/RES/49/60 (1995).

⁴ Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, G.A. Res. 51/210, Dec. 17, 1996, U.N. Doc. A/RES/51/210 (1997).

⁵ The texts of the various universal and regional instruments, as well as the two General Assembly Declarations, are collected in *International Instruments related to the Prevention and Suppression of International Terrorism* (United Nations, New York, 2001), U.N. Sales No. E.01V.3 (2001). See also the comprehensive Web site containing details of the U.N. Action Against Terrorism, at <http://www.un.org/terrorism/>.

⁶ Status as at Aug. 1, 2004.

only four states⁷ had ratified the Convention.⁸

This chapter considers the range of international measures adopted both before and after September 11, 2001, to deny terrorists and their supporters access to the international financial system including the International Convention for the Suppression of the Financing of Terrorism, the terrorist financing aspects of Security Council Resolution 1373 and the role played by the Financial Action Task Force (FATF). As an effective cure usually depends on an understanding of the nature of a particular problem, the first topic considered will be the various sources of terrorist funding.

B. THE SOURCES OF TERRORIST FINANCING

1. Introduction

Terrorist organizations may be funded by states or non-State actors. With regard to the private (non-state) financing of terrorism, a distinction is usually drawn between legitimate funds and unlawful funds. Legitimate funds include donations, money derived from charitable trusts (or similar) and the proceeds of lawful commercial activities. Unlawful funds involve the proceeds of criminal activity including, but not limited to, drug trafficking, money laundering, smuggling and illegal arms deals. This section considers both state and private funding of terrorism and includes an account of the sources of Al Qaeda funding in the period leading up to 9/11. In addition this section also considers notable anti-terrorist financing measures such as President Bush's Executive Order 13224, the role of the Financial Action Task Force (FATF) and the anti-money laundering provisions in Title III of the USA PATRIOT Act.

2. State-Funded Terrorism

During the Cold War the funding of national liberation movements by states was commonplace. In the 1980s the U.S. government

⁷ Botswana, Sri Lanka, the United Kingdom of Great Britain and Northern Ireland and Uzbekistan.

⁸ In accordance with Article 25(1), the Convention was open for signature by all states from January 10, 2000 to December 31, 2001, at the U.N. Headquarters in New York. By September 11, 2001, 40 states had signed the International Convention for the Suppression of the Financing of Terrorism.

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funded both the Nicaraguan *contra* rebels and the resistance to the occupation of Afghanistan by the Soviet Union. In 1983 the Boland Amendment prohibited the federal government from providing military support “for the purpose of overthrowing the Government of Nicaragua” but the Reagan Administration interpreted the amendment narrowly as applying only to U.S. intelligence agencies, thus permitting the National Security Agency—not so labeled—to continue to channel funds to the *Contra* rebels.

In 1986 the International Court of Justice ruled that by training, arming, equipping, financing and supplying the *Contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, the United States had acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another state.⁹

During the 1990s a consensus emerged regarding the unacceptability of financing acts of violence directed at civilians—however labeled. In 1992—in the wake of the destruction of Pan Am Flight 103 over Lockerbie—the Security Council, acting under Chapter VII of the U.N. Charter, instituted a series of economic sanctions in order to force Libya, *inter alia*, to cease assistance to terrorist groups.¹⁰ In 1999 the Security Council imposed similar sanctions against the Taliban regime in Afghanistan in the wake of the bombings of the U.S. Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania.¹¹

In 1994 the General Assembly Declaration on Measures to Eliminate International Terrorism appeared to reject the “national liberation movement exception” to the concept of terrorism when it stated that

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons

⁹ *The Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States) (Merits), 1986 .I.C.J. 14, at 136.

¹⁰ S.C. Res. 748, Mar. 31, 1992, U.N. Doc. S/RES/748 (1992).

¹¹ S.C. Res. 1267, Oct. 15, 1999, U.N. Doc. S/RES/1267 (1999).

for political purposes are *in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.*¹²

The 1994 General Assembly Declaration on Measures to Eliminate International Terrorism also re-affirms that states are obliged “[t]o refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities.”¹³

The combined effect of the judgment of the International Court of Justice in *The Nicaragua Case* (affirmed by the 1994 General Assembly Declaration on Measures to Eliminate International Terrorism), the salutary examples of both Libya and the Taliban and the assertion (latterly endorsed by the Security Council) that state funding of terrorism engages the target state’s right of self-defense¹⁴ has led to a marked decline in the state funding of terrorism.

3. Private Financing of Terrorism by Lawful Means

As noted above, private financing of terrorism may come from either legitimate funds or unlawful funds. Legitimate funds include donations, money derived from charitable trusts (or similar) and the proceeds of lawful activities.¹⁵ Although considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature are not justifications for terrorism, they are powerful motivating factors when terrorist groups are soliciting financial contributions from law-abiding citizens.

¹² Article 1(2) of the 1994 General Assembly Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60, Dec. 9, 1994, U.N. Doc. A/RES/49/60 (1995) (emphasis added).

¹³ Article 5(a) of the 1994 General Assembly Declaration on Measures to Eliminate International Terrorism, *supra* note 12.

¹⁴ See S.C. Res. 1368, Sept. 12, 2001, U.N. Doc. S/RES/1368 (2001). See also Christopher Greenwood, *War, Terrorism and International Law*, 56 CURRENT LEGAL PROBS. 505–30 (2003) and Ilias Bantekas *The International Law of Terrorist Financing*, 97 AM. J. INT’L L. 317 (2003).

¹⁵ Such as the collection of membership dues and/or subscriptions; the sale of publications; speaking tours and cultural and social events.

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Contributions are frequently solicited by front organizations (or legitimate charities) for apparently legitimate charitable ends¹⁶ and subverted at a later stage.¹⁷ In such circumstances, the original donors are unlikely to fall within the definition of terrorist financing contained in 1999 International Convention for the Suppression of the Financing of Terrorism.¹⁸ In 1996 the U.N. General Assembly acknowledged the challenges posed by the funding of terrorists from lawful sources and called upon all states “[t]o take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations that have or claim to have charitable, social or cultural goals.”¹⁹

In the immediate aftermath of 9/11 President Bush issued Executive Order 13224²⁰ entitled “Blocking Property and Transactions with Persons who Commit, Threaten to Commit, or Support Terrorism” obliging all persons subject to U.S. jurisdiction to block or freeze the assets held on behalf of over 30 foreign individuals and organizations listed in an annex.²¹ Section 1(b) of Executive Order 13224 also contains a provision permitting the freezing of the assets of

¹⁶ See Financial Action Task Force, *Guidance for Financial Institutions in Detecting Terrorist Financing* Apr. 24, 2002 para. 14. See also Bantekas, *supra* note 14, at 320.

¹⁷ Where the organization concerned is a genuine charity, the subversion will often occur at the instigation of a dishonest employee without the knowledge of the organization or by the individual beneficiaries. The liability of a charity in such circumstances is considered *infra* at page ***.

¹⁸ See *infra* pages ***-***

¹⁹ Paragraph 3(f) of Resolution 51/210 adopted by the General Assembly [on the report of the Sixth Committee (A/51/631)] on measures to eliminate international terrorism U.N. Doc. A/RES/51/210 (1997).

²⁰ Pursuant to the authorities of the International Emergency Economic Powers Act (50 U.S.C. § 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. § 1601 et seq.), sec. 5 of the United Nations Participation Act of 1945, as amended (22 U.S.C. § 287c) (UNPA), and sec. 301 of title 3, United States Code.

²¹ For a commentary on operation of Executive Order 13224, see Kern Alexander, *United States Financial Sanctions and International Terrorism, Part 1*, 2

foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

The term “terrorism” is defined in Section 3(d) of Executive Order 13224 as meaning

an activity that (i) involves a violent act or an act dangerous to human life, property, or infrastructure; and (ii) appears to be intended

- (a) to intimidate or coerce a civilian population;
- (b) to influence the policy of a government by intimidation or coercion; or
- (c) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

The list of foreign individuals and entities designated under Executive Order 13224 continues to grow²² and the Executive Order is undoubtedly successful in its aim of freezing the assets of designated individuals and entities subject to U.S. jurisdiction even where the assets have come from legitimate funds. By February 2002 over U.S. \$34 million in terrorist-related assets had been frozen within the territorial jurisdiction of the United States.²³ However Executive Order 13224 is only as effective as the designation process (and overzealous designation may fuel resentment), and it only operates within the jurisdiction of the United States.

As the Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change recently acknowledged, where terrorists have access to funds with a legal origin, regulation is

J. INT’L BANKING & FIN. L. 81–83 (2002) and Luca G Radicati Di Brozolo & Mauro Megliani, *Freezing the Assets of International Terrorist Organisations*, in ANDREA BIANCHI ED., ENFORCING INTERNATIONAL NORMS AGAINST TERRORISM 387–91 and 402–03 (2004).

²² See <http://www.ustreas.gov/offices/enforcement/ofac/sanctions/t11ter.pdf> for an updated list.

²³ Alexander, *supra* note 21, at 82.

difficult.²⁴ The Financial Action Task Force (FATF)²⁵ has recommended that countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. In FATF's view non-profit organizations are particularly vulnerable, and countries should ensure that they cannot be misused:

- by terrorist organizations posing as legitimate entities;
- to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
- to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organizations.²⁶

Regulating the private funding of terrorism by lawful means is particularly problematic because the typologies involved—money from easy to identify sources being used for apparently lawful purposes—do not mimic the processes of traditional money laundering, *i.e.*, large sums of cash from unspecified sources (“dirty” money) being laundered through financial institutions so as to appear to come from lawful activities.²⁷ In FATF's view “[t]he misuse of non-

²⁴ The Report of the Secretary-General's High Level Panel on Threats, Challenges and Change *A more secure world: Our shared responsibility*, para 149, U.N. Doc. A/59/565 (2004), available at <http://www.un.org/secureworld/>. See also INTERNATIONAL BAR ASSOCIATION'S TASK FORCE ON INTERNATIONAL TERRORISM, INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES 118–19 (2003).

²⁵ The Financial Action Task Force (FATF) was created in 1989 by the leaders of the G7 and the President of the European Commission. Its original brief was to coordinate and spearhead an international campaign against money laundering. After 9/11 its remit was widened to include the fight against the financing of terrorism. Thirty-one states and two regional organizations are currently members of the FATF, and a number of FATF-style regional bodies and other international organizations have observer status with the FATF. The FATF Web site can be found at <http://www.fatf-gafi.org/>.

²⁶ *The Financial War on Terrorism—A Guide by the Financial Action Task Force* (FATF-GAFI 2004) Special Recommendation VIII “Non-profit organisations,” at 19, available at http://www1.oecd.org/fatf/TerFinance_en.htm.

²⁷ See *The Financial War on Terroris*, *supra* note 26, at 69–70 for a description of the various typologies of terrorist misuse of non-profit organizations.

profit organisations for the financing of terrorism is coming to be recognised as a crucial weak point in the global struggle to stop such funding at its source,”²⁸ and the FATF has made the implementation of measures (international best practices) to protect non-profit organizations from abuse a priority focus.²⁹

The FATF’s recommendations to prevent the misuse of non-profit organizations by terrorists include greater financial transparency (including financial auditing of the accounts of non-profit organizations), verification of spending (including field examinations and verification of the existence of the beneficiaries) and strengthening the managerial aspect of non-profit organizations (*i.e.*, adopting standards taken from the corporate world and applying them to directors of non-profit organizations).³⁰ The implementation of the FATF’s recommendations on non-profit organizations will require some refocusing of the efforts by the various national oversight, regulation and accreditation bodies whose concentration hitherto has been on the maintenance of donor confidence through combating waste and fraud.

4. Private Financing of Terrorism by Unlawful Means

The methods used by terrorists and their associates to generate funds from illegal sources differ little from those used by traditional criminal organizations.³¹ Unlawful funds involve the proceeds of criminal activity including, but not limited to, drug trafficking, money laundering, smuggling and illegal arms deals. In October 2004 Antonio Maria Costa, Executive Director of the U.N. Office on Drugs and Crime (UNODC), warned about a nexus between illicit drugs, organized crime, and international terrorism in Afghanistan, the Andean countries in South America and Morocco.³²

²⁸ *The Financial War on Terrorism* *supra* note 26, at 61.

²⁹ *Id.*

³⁰ *See id.* at 63–66.

³¹ Financial Action Task Force, *Guidance for Financial Institutions in Detecting Terrorist Financing* Apr. 24, 2002, para. 15.

³² *See* U.N. Information Service, *UN Warns About Nexus Between Drugs, Crime and Terrorism*, UNIS/CP/500, Sept. 30, 2004, available at <http://www.unis.unvienna.org/unis/pressrels/2004/uniscp500.html>.

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The problems posed by money laundering are well known.³³ In 1990 the FATF first issued its Forty Recommendations setting out an international framework for anti-money laundering efforts. The Recommendations were first revised in 1996 to take into account changes in money-laundering trends³⁴ and revised again in 2003 into a new comprehensive framework for combating money laundering and terrorist financing.³⁵ In 1988 the U.N. Convention Against Illicit Trade in Narcotic Drugs and Psychotropic Substances³⁶ placed the issue of proceeds of crime on the global agenda³⁷ and highlighted the problems caused by bank secrecy and “offshore” financial havens.³⁸

Although the solutions to the problem of international money laundering are also well known, states have resisted implementing measures to tackle the problem due to concerted pressure from the financial services sector unwilling to lose the fees generated from (unknowingly?) laundering the proceeds of crime. The “dollarization” (*i.e.*, the use of U.S. dollars in transactions) of many black market transactions makes the response of the United States particularly important in the fight against international money laundering.

Title III of the USA PATRIOT Act³⁹ (hereinafter the Patriot Act) entitled the International Money Laundering Abatement and Anti-

³³ See, for example, the First Interim Report of the President’s Commission on Organized Crime, *The Cash Connection: Organized Crime, Financial Institutions and Money Laundering* (1984).

³⁴ See *The 40 Recommendations* (1996), available at http://www.fatf-gafi.org/40Recs-1996_en.htm.

³⁵ See *The Financial War on Terrorism*, *supra* note 26, Part 2: Money Laundering.

³⁶ Adopted in Vienna on Dec. 20, 1988. There are currently 171 parties to this Convention.

³⁷ See art. 5 of the U.N. Convention Against Illicit Trade in Narcotic Drugs and Psychotropic Substances, available at <http://www.incb.org/e/conv/1988/>.

³⁸ See U.N. Office for Drug Control and Crime Prevention, *Financial Havens, Banking Secrecy and Money Laundering* (United Nations, New York, 1998), U.N. Sales No. V.98-55024 (1998).

³⁹ The full title of the USA PATRIOT Act is the United and Strengthening

Terrorism Act 2001 represents the most significant strengthening of anti-money-laundering legislation in the United States since money laundering was made a crime in the United States in 1986. Title III of the Patriot Act will only terminate (*i.e.*, “sunset”) if Congress enacts a specified joint resolution to that effect.⁴⁰ Prior to 9/11 many prominent U.S. banks, through the correspondent accounts that they provided to foreign banks, were conduits for large amounts of “dirty money” flowing into the American financial system that facilitated illicit enterprises, including drug trafficking, political corruption and financial frauds.⁴¹

Title III of the Patriot Act expands the authority of the Secretary of the Treasury to regulate the activities of U.S. financial institutions with particular reference to their relations with foreign individuals and entities.⁴² A wide range of individuals in the financial services sector are now required to file suspicious activity reports (SARs). Section 312(1) of Title III requires “appropriate, specific, and, where necessary, enhanced” due diligence policies, procedures and controls for financial institutions⁴³ that establish, maintain, admin-

America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56.

⁴⁰ Sec. 303(a) of the Patriot Act.

⁴¹ See Linda Gustitus & Robert Roach, *Correspondent Banking: A Gateway for Money Laundering*, 6 *Economic Perspectives* (2001)—An Electronic Journal of the U.S. Department of State, available at <http://usinfo.state.gov/journals/ites/0501/ijee/levin.htm>. See also Minority Staff of the Permanent Committee on Investigations, *Report on Correspondent Banking: A Gateway for Money Laundering* (Feb. 5, 2001), available at http://www.senate.gov/~gov_affairs/psi_final-report.pdf.

⁴² Sec. 311 of the Patriot Act amending subchapter II of ch. 53 of title 31, United States Code inserting a new § 5318A.

⁴³ The pre-Title III definition of financial institution included FDIC-insured depository institutions, trust companies, SEC-registered broker-dealers, insurance companies, private bankers, agencies and branches, investment banks and companies, currency exchangers, licensed money transmitters, credit card systems operators, dealers in precious metals and jewels, pawn-brokers, finance lenders, travel agencies, telegraph companies, real estate agents, the United States Postal Service, certain casinos and automobile, airplane and boat dealers. Section 312 of Title III of the Patriot Act adds credit

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ister or manage a private banking account⁴⁴ or a correspondent account in the United States for a non-U.S. person.⁴⁵ Section 312(2) (A) applies additional standards for correspondent accounts where the account is requested on behalf of a foreign bank operating (1) under an offshore banking licence; or (2) under a banking licence issued by a foreign country that has been designated as either

- non-cooperative with international anti-money-laundering principles or procedures by an inter-governmental group or organization of which the United States is a member (such as the FATF) and with which designation of the United States representative to the group or organization concurs; or
- by the Secretary of the Treasury as warranting special measures due to money-laundering concerns.

Section 312(2) (B) states that the enhanced due diligence policies, procedures and controls required for correspondent accounts falling under the “special” regime created by Section 312(2) (A) shall “at a minimum” ensure that the financial institution in the United States takes reasonable steps:

- to ascertain the identity of each of the owners of the foreign bank and the nature and extent of the ownership interest of each such owner;
- to conduct enhanced scrutiny of private banking accounts and foreign accounts to guard against money laundering and report any suspicious transactions;

unions, futures commission merchants, commodity and trading advisors and commodity pool operators.

⁴⁴ Defined as requiring a minimum aggregate deposit of funds or other assets of not less than U.S. \$1,000,000. Section 312(3) lays down the minimum due diligence standards required for private banking accounts with particular emphasis on determining whether a private banking account is being used by a foreign political figure (or an immediate family member or close associate) to launder the proceeds of foreign corruption.

⁴⁵ Including a foreign individual visiting the United States or a representative of a non-U.S. person.

- to ascertain whether the foreign bank provides correspondent accounts to other foreign banks and, where this is the case, provide the due diligence information required by Section 312(1).

Section 313 of Title III prohibits U.S. financial institutions from establishing, maintaining, administering or managing correspondent accounts in the United States for “shell banks,” *i.e.*, a bank that does not have a physical presence in any country or an affiliation with a depository institution, credit union, or foreign bank that maintains a presence in the United States or a foreign country with appropriate supervision.

Section 314 of Title III empowers the Secretary of the Treasury to adopt regulations to ensure greater information sharing and cooperation among financial institutions, their regulatory authorities and law-enforcement authorities regarding “individuals, entities and organizations engaged in or reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities.”

Section 315 of Title III includes foreign corruption offenses as money laundering offenses. Section 316 of Title III provides a mechanism for challenging the forfeiture of assets of suspected international terrorists. Section 317 of Title III provides for the “long arm jurisdiction” of U.S. district courts over non-U.S. persons⁴⁶ suspected of committing money-laundering offenses in the United States. Section 319 of Title III is even more worrying for foreign banks as it allows U.S. courts acting under a forfeiture order, arising from dealings in narcotic drugs, to seize funds in an inter-bank account in the United States to the value of the relevant funds deposited in an unconnected account in the foreign bank. Section 319 also provides that the Attorney General, in consultation with the Secretary of the Treasury, may suspend or terminate the forfeiture where the Attorney General determines that there is a conflict of law and “that such suspension or termination would be in the interests of justice and would not harm the national interests of the United States.”

⁴⁶ Including non-U.S. financial institutions that maintain bank accounts at financial institutions in the United States.

The strengthening of anti-money-laundering legislation in the United States and the growing acceptance of the Euro as a viable worldwide alternative to the U.S. dollar might encourage money launderers to switch their activities to financial institutions that fall outside the jurisdiction of Title III of the Patriot Act. However the European Union has also been vigorous in responding to the events of 9/11,⁴⁷ drafting new legislation to provide a legal basis for freezing the assets of terrorist groups and amending the 1991 Money Laundering Directive.⁴⁸

5. The Funding of Al Qaeda

According to the *9/11 Commission Report*, “Bin Laden and his aides did not need a very large sum to finance their planned attack on America. The 9/11 plotters eventually spent somewhere between US \$400,000 and US \$500,000 to plan and conduct their attack.”⁴⁹ The origins of the specific funds remains unknown, although there is information available about Al Qaeda’s funding in the period leading up to 9/11.⁵⁰

Although Osama Bin Laden allegedly inherited U.S. \$300 million when his father died, he was forced to sell his share in the family company in 1994 and the Saudi government subsequently froze the proceeds of the sale. “This action had the effect of divesting Bin Laden of what otherwise might indeed have been a large fortune.”⁵¹

⁴⁷ For a discussion of these developments, see Jörg Monar, *The European Union and the challenge of 11 September 2001: Potential and limits of a “new” actor in the fight against international terrorism*, in PAUL EDEN & THÉRÈSE O’DONNELL EDS., *SEPTEMBER 11, 2001: A TURNING POINT IN INTERNATIONAL AND DOMESTIC LAW? ***_**** (2005) and August Reinisch, *The Action of the European Union to Combat International Terrorism*, in BIANCHI ED., *supra* note 21, at 119–62.

⁴⁸ Directive 2001/97/EC of the European Parliament and of the Council of Dec. 4, 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, OFFICIAL JOURNAL L. 344, 28/12/2001, at. 76.

⁴⁹ *The 9/11 Commission Report*, available at <http://www.9-11commission.gov/report/911Report.pdf> Chapter 5.4 “A Money Trail,” at 169.

⁵⁰ *Id.*

⁵¹ *Id.*

Bin Laden also owned a number of businesses in Sudan, but these were small or not economically viable and, when Bin Laden left Sudan in 1996, the Sudanese government expropriated all his assets.

On his arrival in Afghanistan,⁵² Osama Bin Laden relied on the charity of the Taliban until he was able to re-establish ties with the wealthy Saudi Arabian individuals who had provided funding during the war in Afghanistan in the 1980s. In the view of the *9/11 Commission Report*:

Some individual donors surely knew, and others did not, the ultimate destination of their donations. Al Qaeda and its friends took advantage of Islam's strong calls for charitable giving, *zakat*. These financial facilitators also appeared to rely heavily on certain imams at mosques who were willing to divert *zakat* donations to al Qaeda's cause. Al Qaeda also collected money from employees of corrupt charities.⁵³

The CIA has estimated that it cost Al Qaeda approximately U.S. \$30 million to sustain its activities before 9/11 and that this was raised almost entirely from donations.⁵⁴ The 9/11 Commission found no evidence that "the Saudi government as an institution or senior Saudi officials individually funded the organization" but the 9/11 Commission also found that "[t]his conclusion does not exclude the likelihood that charities with significant Saudi government sponsorship diverted funds to Al Qaeda."⁵⁵ More recently there have been allegations that "Osama bin Laden is using cash from the Afghanistan heroin market to finance his life on the run."⁵⁶

⁵² An unnamed American diplomat has described the effect of the American pressure that resulted in Osama bin Laden's removal from Sudan as being "like sending Lenin back to Russia." See Mary Ann Weaver, *The Real bin Laden*, NEW YORKER, Jan. 24, 2000, available at http://www.newyorker.com/archive/content/?010924fr_archive03.

⁵³ *The 9/11 Commission Report*, *supra* note 49, at 170 (excluding footnote references).

⁵⁴ *Id.*

⁵⁵ *Id.* at 171.

⁵⁶ Rowan Scarborough, *Heroin traffic finances bin Laden*, WASH. TIMES Dec. 6,

6. Conclusion

As governments act to prevent terrorists and their supporters from gaining easy access to the international financial system, a situation akin to Robert Merton's blocked opportunity thesis will arise.⁵⁷ Of the three possible responses predicted by Merton for those who are excluded from the institutional arrangements, terrorist organizations are most likely to follow the path of innovation and increase their reliance on criminal behavior to ensure continued funding for their activities. The recent conviction in the United Kingdom of a gang allegedly using the proceeds of a High Street check fraud scheme to finance terrorism in Algeria is clear evidence of this danger.⁵⁸

B. THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

1. Introduction

The most significant feature of the 1999 International Convention for the Suppression of the Financing of Terrorism (hereinafter the Terrorist Financing Convention) is that, unlike previous conventions aimed at the suppression of terrorism, the Convention is not directed against a specific crime but with the financing of criminal behavior by terrorists generally. Although it is self-evident that financing aids the commission of the acts already outlawed by the various multi-lateral counter-terrorism conventions, outlawing the financing of such acts was somewhat novel and gave rise to considerable definitional challenges.

The idea for an international convention for the suppression of terrorist financing originated with France and the initial draft was considered by both the member states of the European Union and

2004, available at <http://washingtontimes.com/national/20041206-124320-5344r.htm>.

⁵⁷ See Robert Merton, *Social Structure and Anomie*, 3 AM. SOCIOLOGICAL REV. 672-82 (1938).

⁵⁸ See Lewis Smith, *High Street Fraud Raised Millions for Terrorism*, TIMES, NOV. 25, 2004, 38. See also BBC NEWS World Edition, *Fraudsters jailed for cheque scam*, Nov. 24, 2004, available at http://news.bbc.co.uk/2/hi/uk_news/4039071.stm.

the G8⁵⁹ before a revised draft was tabled by France before the Sixth Committee at their 53rd Session in 1998 for consideration by the *Ad Hoc* Committee established pursuant to Resolution 51/210 of December 17, 1996. The work on the creation of a draft international convention for the suppression of international terrorism was delegated to a Working Group of the Sixth Committee chaired by Mr Philippe Kirsch of Canada.⁶⁰

The utility of creating a substantive offense of terrorist financing was initially challenged⁶¹ on the grounds that anyone who financed a crime outlawed by one of the existing various multi-lateral counter-terrorism conventions would undoubtedly commit the crime of being an accomplice and the existing multi-lateral counter-terrorism conventions already criminalized the activities of accomplices.⁶² Further Article 15(a) of the 1997 Convention for the Suppression of Terrorist Bombings already expressly required state parties, *inter alia*, “to prohibit in their territories . . . persons, groups and organizations that . . . knowingly finance” an offense within the meaning of the Convention. Nevertheless, the consensus supported the creation of a new substantive offense of terrorist financing on the grounds that it was necessary to treat those who finance terrorist crimes as severely as those who commit terrorist offenses.

⁵⁹ The G8 consists of Canada, France, Germany, Italy, Japan, Russia (not a member of the G7), the United Kingdom and the United States. The European Union participates in G8 summits and is represented by the President of the European Council and the President of the European Commission.

⁶⁰ See *The Report of the Working Group on Measures to eliminate international terrorism*, Sixth Committee, 54th Session, Agenda Item 160 at 2, U.N. Doc. A/C.6/54/L.2 (Oct. 26, 1999).

⁶¹ See Anthony Aust, *Counter-Terrorism—A New Approach*, 5 MAX PLANCK Y.B. U.N. L. 288 (2001).

⁶² See, for example, Article 1(2)(b) of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Article 1(2)(b) of the 1979 Hostages Convention and Article 2(3)(a) of the 1997 International Convention for the Suppression of Terrorist Bombings.

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2. The Offense of Terrorist Financing

a. Introduction

Article 2(1) of the 1999 Terrorist Financing Convention defines the offense of terrorist financing as follows

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in an armed conflict, when the purpose of such act by its nature or context, is to intimidate a population, or to compel a government or international organization to do or abstain from doing any act.

By September 11, 2001, only four states⁶³ had ratified the Terrorist Financing Convention and it had not yet come into force.⁶⁴ Recognizing the need for urgent action, the Financial Action Task Force (FATF) met in Washington D.C. on October 29–30, 2001 and, in an extraordinary plenary meeting, decided to expand its mandate beyond money laundering to include the combating of terrorist financing. At the same meeting the FATF generated a new set of recommendations on terrorist financing, which it called upon all countries to adopt and implement.⁶⁵ Special Recommendation II states: “Each country should criminalise the financing of terrorism, terrorist

⁶³ Botswana, Sri Lanka, the United Kingdom of Great Britain and Northern Ireland and Uzbekistan.

⁶⁴ Article 26 of the Terrorist Financing Convention provided that the Convention would only come into force on the 30th day following the date of the deposit of the 22nd instrument of ratification. The Terrorist Financing Convention came into force on April 10, 2002.

⁶⁵ The Eight FATF Special Recommendations on Financing Terrorism, available at http://www.fatf-gafi.org/SRecsTF_en.htm.

acts and terrorist organizations. Countries should ensure that such offences are designated as money laundering predicate offences.”

Although the Terrorist Financing Convention had not come into force at the time that Special Recommendation II was originally issued—and thus it was not cited in the Special Recommendation itself—the intent of the FATF was to reiterate and reinforce the criminalization standard as set forth in Article 2 of the Convention.⁶⁶

b. The External (or Material) Elements of the Offense of Terrorist Financing

There are two main material elements involved in the offense of terrorist financing. The first material element is “financing.” The second material element encompasses the terrorist acts as defined in Article 2(1)(a) and (b) and is considered separately below.⁶⁷

Financing is broadly defined in Article 2(1) of the Terrorist Financing Convention as “by any means, directly or indirectly, . . . provid[ing] or collect[ing] funds.” The words “by any means, directly or indirectly” were adopted so as to prevent any loopholes,⁶⁸ *i.e.*, it does not matter how the funds get to the terrorists. Article 2(3) of the Terrorist Financing Convention makes clear that for an act to constitute an act of terrorist financing, it is not necessary that the funds in question were used to carry out an act of terrorism as defined in Article 2(1)(a) or (b). Article 2(4) provides that even if the funds do not reach the terrorists, a person with the requisite *mens rea* can be charged with attempting to finance terrorism.⁶⁹

In addition to criminalizing the provision or collection of funds, the French working paper had also included the concept of “reception” of funds in square brackets acknowledging the views expressed during the *Ad Hoc* Committee session in favor of including such as

⁶⁶ See *Interpretative Note to Special Recommendation II: Criminalising the financing of terrorism and associated money laundering* n.1 available at http://www1.oecd.org/fatf/pdf/insr2_en.pdf.

⁶⁷ See *infra* pages ***-***.

⁶⁸ Aust, *supra* note 61, at 294.

⁶⁹ Provision for accessory liability is contained in Article 2(5) of the Terrorist Financing Convention.

reference.⁷⁰ Those in favor of including a reference to the “reception” of funds argued that this would “enhance the capability of States to counter the funnelling of funds through middlemen.”⁷¹ Those opposed to the inclusion of the concept of “reception” of funds expressed the concern that it would cast the meaning of the term “financing” too broadly, “criminalising a wide variety of activities beyond what was originally conceived.”⁷² Although the reference to the “reception” of funds was not retained in the text adopted by the U.N. General Assembly, it is submitted that middlemen who funnel funds to terrorist groups will—subject to establishing the requisite *mens rea*—either be guilty of indirectly collecting and/or providing funds or, in the alternative, be guilty of aiding and abetting and thus liable as an accomplice to the offense of terrorist financing.⁷³

Article 1(1) provides that for the purposes of the Terrorist Financing Convention

“Funds” means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit.

The words “included but not limited to” were expressly added to the definition to make it clear that the list was merely illustrative,⁷⁴ *i.e.*, the maxim *expressio unius est exclusio alteris* is not applicable here.

⁷⁰ Informal summary of the discussions in the Working Group prepared by the Chairman, reproduced as Annex III of *The Report of the Working Group on Measures to eliminate international terrorism* Sixth Committee, 54th Session, Agenda Item 160, at 55–83, paras. 36–38, U.N. Doc. A/C.6/54/L.2 (Oct. 26, 1999).

⁷¹ *Id.*

⁷² *Id.*

⁷³ Article 5(a) of the Terrorist Financing Convention states that a person who participates as an accomplice can be held liable for the offence of terrorist financing or for attempting to finance terrorism.

⁷⁴ See the Informal summary of the discussions in the Working Group, *supra* note 70, at para. 44.

As Lavelle has commented, the Terrorist Financing Convention stretches the meaning of the term “funds” very far beyond its normal dictionary meaning of pecuniary resources.⁷⁵ It is noteworthy that the U.N. Office on Drugs and Crime (UNODC) Model Terrorist Financing Bill, drafted for use in countries whose fundamental legal systems are substantially based on the common law tradition, replaces the word “funds” with the word “property.”⁷⁶

c. *The Mental Elements (MensRea) of the Offense of Terrorist Financing*

There are two distinct mental elements required in order for a person to be found guilty of the offense of terrorist financing. First, the funds must have been collected or provided “unlawfully and wilfully.” Secondly, the funds must have been collected or provided “with the intention that they should be used or in the knowledge that they are to be used, in full or in part in order to carry out” an act of terrorism as defined in Article 2(1)(a) or (b) of the Terrorist Financing Convention. The Terrorist Financing Convention does not provide further information on these two aspects of the mental element, and thus they are to be applied in accordance with the understanding of the relevant concepts—“unlawfully,” “wilfully,” “with the intention” “or in the knowledge”—in the general criminal law of the relevant state party to the Convention.⁷⁷

With regard to the requirement that the funds must have been collected or provided “unlawfully and wilfully,” the inclusion of the word “unlawfully” was initially challenged on the grounds that it was tautologous but it was retained “since it added an element of flexibility by, for example, excluding from the ambit of application of the draft convention legitimate activities such as those of humanitarian

⁷⁵ Roberto Lavelle, *The International Convention for the Suppression of the Financing of Terrorism*, 60 *ZaöRV* 496 (2000).

⁷⁶ See Clause 2(c) of the UNODC Model Terrorist Financing Bill 2003, available at <http://www.imolin.org/imolin/tfbill03.html>.

⁷⁷ See International Monetary Fund Legal Department, *Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting*, at 7 IMF Doc K5256. S87 2003 (2003), available at <http://www.imf.org/external/pubs/nft/2003/SFTH/>. See also Lavelle, *supra* note 75, at 497–500.

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organisations and ransom payments.”⁷⁸ The word “wilfully” emphasizes that the financing has to be done deliberately and not accidentally or negligently. It is noteworthy that the 2003 UNODC Model Terrorist Financing Bill excludes the terms “unlawfully and wilfully” from the definition of its primary offense of terrorist financing.⁷⁹ As the preamble (referred to as the Memorandum of Objects and Reasons) states, *inter alia*, that “the object of this bill is to bring into force the provisions of the International Convention for the Suppression of the Financing of Terrorism, 1999,” it is entirely possible that a court in a common law jurisdiction, which has enacted the UNODC Model Terrorist Financing Bill, will read in the words “unlawfully and wilfully” in appropriate circumstances (although it is more likely that hard cases—such as the paying of a ransom—would be the subject of prosecutorial discretion).

The second mental element is expressed in the alternative, *i.e.*, that the funds must have been collected or provided “with the intention that they should be used *or* in the knowledge that they are to be used, in full or in part in order to carry out” an act of terrorism as defined in Article 2(1) (a) or (b) of the Terrorist Financing Convention. The concept of intention in civil law systems includes the notion of *dolus eventualis* (*i.e.*, indifference to a foreseen possible outcome).⁸⁰ Although common law jurisdictions recognize a concept of “oblique” or “indirect” intention, the scope of this concept is considerably narrower than *dolus eventualis*.⁸¹

The alternative formulation of the second mental element is much wider and enables a conviction to be obtained where the provider or collector of the funds merely has “knowledge” that the

⁷⁸ Informal summary of the discussions in the Working Group, *supra* note 70, at para. 67. *See also* Aust, *supra* note 61, at 294–95.

⁷⁹ Clause 3 of the 2003 UNODC Model Terrorist Financing Bill provides that “Every person who, directly or indirectly, provides or collects property intending, knowing or having reasonable grounds to believe that it will be used in whole or part to carry out a terrorist act is guilty of an offence.”

⁸⁰ *See* Lavalle, *supra* note 75, at 499.

⁸¹ For the position in English law, *see* *R v. Woollin* [1999] AC 82 (HL) and *R v. Matthews*, *R v. Alleyne* [2003] EWCA Crim 192, [2003] 2 Cr App R 30 (CA).

funds are to be used in order to carry out a terrorist act.⁸² The word “knowledge” implies that a person must possess actual foresight of the consequences of the act and that a negligent failure to foresee that the funds are sought to carry out a terrorist act is insufficient.

The United Kingdom had proposed, during the drafting of the Terrorist Financing Convention, that it should be sufficient for the offense if a person provided funds where there was a reasonable suspicion that the funds would be used for a terrorist act unless the person providing or collecting the funds could prove otherwise.⁸³ The British proposal was based on the approach taken to crimes such as drug trafficking in the 1988 U.N. Convention Against Illicit Trade in Narcotic Drugs and Psychotropic Substances.⁸⁴

The British proposal was rejected during negotiations⁸⁵ but, in 2002, the FATF stated that “[l]aws should provide that the intentional element in [money laundering] and [financing terrorism] may be inferred from objective factual circumstances.”⁸⁶ The ability to infer intention from objective factual circumstances had previously been included in the FATF’s Forty Recommendations on Money Laundering⁸⁷ but there is no similar provision in the Terrorist Financing Convention.

⁸² Article 2(3) of the Terrorist Financing Convention makes clear that, for an act to constitute an act of terrorist financing it is not necessary that the funds were in fact used to carry out an act of terrorism.

⁸³ See the Proposal submitted by the United Kingdom of Great Britain and Northern Ireland (A/C.6/54/WG.1/CRP.16), reproduced in *The Report of the Working Group on Measures to eliminate international terrorism*, *supra* note 60, at 37.

⁸⁴ Article 3(3) of the 1988 U.N. Convention against Illicit Trade in Narcotic Drugs and Psychotropic Substances states: “Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.”

⁸⁵ See Aust, *supra* note 61, at 295–96.

⁸⁶ *Report on the Outcome of the FATF Plenary Meeting and Proposal for the Endorsement of the Methodology for Assessing Compliance with Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Standard Annex II*, at 8 IMF (Nov. 8, 2002), available at <http://www.imf.org/external/np/mae/aml/2002/eng/110802.pdf>.

⁸⁷ “As provided in [the 1988 U.N. Convention against Illicit Traffic in

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When the United Kingdom incorporated the offense of terrorist financing into its domestic law, the “knowledge” aspect of the offense was enacted to enable a conviction to be obtained where the person providing or receiving the money or property “has reasonable cause to suspect that it may be used, for the purposes of terrorism.”⁸⁸ Similarly clause 3 of the 2003 UNODC Model Terrorist Financing Bill adds “or having reasonable grounds to believe” to the existing alternatives of “intention” and “knowledge.”

d. Conclusion

Article 5 of the Terrorist Financing Convention provides that

1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence as set forth in article 2. Such liability may be criminal, civil or administrative.
2. Such liability is incurred without prejudice to the criminal liability of individuals who have committed the offences.
3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

In the context of international anti-terrorist conventions, the proposal to criminalize the activities of legal entities is unique. Previous counter-terrorism conventions were concerned with “tangible” acts that by their very nature—hijacking, bombing, hostage-

Narcotic Drugs and Psychotropic Substances (the Vienna Convention)], “the offence of money laundering should apply at least to knowing money laundering activity, including the concept that knowledge may be inferred from objective factual circumstances.” FATF *The 40 Recommendations* (1996), Recommendation 5 available at http://www.fatf-gafi.org/40Recs-1996_en.htm.

⁸⁸ See secs. 15(2)(b) and 15(3)(b) of the Terrorism Act, 2000 ch. 11—in force from Feb. 19, 2001.

taking—were thought of as only being committed by individuals.⁸⁹ By contrast the financing of terrorism was regarded as an “intangible” act that would almost inevitably require the involvement of a legal entity such as a bank.⁹⁰ The criminal liability of corporations had previously been included in the FATF’s Forty Recommendations on Money Laundering.⁹¹

It should be noted that Article 5(1) of the Terrorist Financing Convention, while requiring states to hold legal entities accountable for the financing of terrorism, also states that “[s]uch liability may be criminal, civil or administrative.” This qualification was necessary because, in many states, only natural persons can incur criminal liability. Where a state recognizes the potential criminal liability of legal entities, such as corporations, establishing the *mens rea* of the legal entity will be determined by the relevant principles of national law of the state in question.⁹²

3. The Definition of Terrorism

a. Introduction

The first attempt to define terrorism at an international level occurred in the League of Nations 1937 Convention on the Prevention and Punishment of Terrorism.⁹³ Article 2(1) of the 1937 Convention defined a “terrorist act” as (1) a criminal act, (2) against a state, (3) performed and intended to create a situation of terror among individuals, a group of individuals or the civilian population. Although signed by 24 states, the League of Nations’ Convention on the Prevention and Punishment of Terrorism only attracted one ratification (from India) and never entered into force.

⁸⁹ See Aust, *supra* note 61, at 301.

⁹⁰ *Id.*

⁹¹ “Where possible, corporations themselves—not only their employees—should be subject to criminal liability.” FATF *The 40 Recommendations* (1996), Recommendation 6, available at http://www.fatf-gafi.org/40Recs-1996_en.htm.

⁹² See, for example, *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 2 AC 500 (PC).

⁹³ Signed in Geneva on Dec. 16, 1937.

In 1970 the General Assembly's Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations⁹⁴—adopted without a vote—included a provision stating that: “Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”

In *The Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States) (Merits)⁹⁵ the International Court of Justice quoted this provision of the 1970 Friendly Relations Declaration and suggested that “the adoption by States of this text affords an *opinio iuris* as to customary international law on the question.”⁹⁶ Given the strenuous disagreement between states regarding the appropriate definition of terrorism,⁹⁷ it cannot seriously be asserted that the International Court of Justice was acknowledging a generally accepted definition of terrorism.⁹⁸

In *Tel-Oren v Libyan Arab Republic*⁹⁹ the District Court of Columbia stated that “no consensus has developed on how properly to define ‘terrorism’ generally,”¹⁰⁰ and in *United States v Yousef*,¹⁰¹ the Second

⁹⁴ G.A. Res. 2625, Annex, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/5217, at 121 (1970).

⁹⁵ 1986 I.C.J. 14.

⁹⁶ *Id.* at para. 191.

⁹⁷ See generally John Dugard, *The Problem of the Definition of Terrorism in International Law* and Surya Subedi, *The War on Terror and the United Nations' Attempts to Adopt a Comprehensive Convention on International Terrorism*, in EDEN & O'DONNELL EDS., *supra* note 47, at ***-***. See also *A more secure world: Our shared responsibility*, *supra* note 24, at paras. 157–164.

⁹⁸ See, for example, Rosalyn Higgins, *The general international law of terrorism*, in ROSALYN HIGGINS & MAURICE FLORY EDS., *TERRORISM AND INTERNATIONAL LAW* 13–29 (1997) concluding that the term terrorism is “a term of convenience . . . has no specific meaning” and is “without legal significance” (*id.* at 28–29).

⁹⁹ 726 F.2d 774 (DC Cir. 1984).

¹⁰⁰ *Id.* at 806–07 (per Bork J concurring).

¹⁰¹ 327 F.3d 56 (2d Cir. 2003).

Circuit of the U.S. Court of Appeals concluded that almost two decades after the decision in *Tel-Oren* “we regrettably are no closer now than eighteen years ago to an international consensus on the definition of terrorism or even its proscription.”¹⁰²

In spite of the inability of the members states of the United Nations to agree on an anti-terrorism convention including a definition of terrorism, the international community has been able to advance the fight against terrorism by concluding 11 “crime-specific” anti-terrorism conventions that have side-stepped the need for a general definition of terrorism. The 1999 Terrorist Financing Convention builds on this earlier work but goes somewhat further as it also contains the first attempt at a generic definition of terrorism albeit within the “crime-specific” context of the crime of terrorist financing.

b. The Definition of Terrorism Contained in the 1999 Terrorist Financing Convention

Article 2(1) of the Terrorist Financing Convention defines terrorism as

- (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
- (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in an armed conflict, when the purpose of such act by its nature or context, is to intimidate a population, or to compel a government or international organisation to do or abstain from doing any act.

The treaties listed in the annex are nine¹⁰³ of the 11¹⁰⁴ major universal “crime specific” anti-terrorism conventions. The 1963

¹⁰² *Id.* at 86.

¹⁰³ The Convention for the Suppression of the Unlawful Suppression of Unlawful Seizure of Aircraft, done at The Hague on Dec. 16, 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation done at Montreal on Sept. 23, 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, adopted by the United Nations General Assembly on Dec. 14, 1973; the International Convention against the Taking of

Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft was excluded as it is primarily concerned with ordinary “penal” offenses—such as drunkenness—that could jeopardize the safety of an aircraft or good order and discipline on board an aircraft.¹⁰⁵ The 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection self-evidently falls outside the ambit of mischief that the 1999 Terrorist Financing Convention seeks to suppress. Article 23 of the Terrorist Financing Convention provides a mechanism for amending the annex by the addition of relevant new treaties provided that such treaties: (1) are open to the participation of all states; (2) have entered into force; and (3) have been ratified by at least 22 states that are party to the Terrorist Financing Convention.

Significantly, Article 2(2)(a) of the Terrorist Financing Convention provides that states that are not party to a particular anti-terrorism convention—on depositing their instrument of ratification, acceptance, approval or accession—are entitled (but not obliged) to declare that “in the application of this Convention to the State party, the treaty shall be deemed not to be included in the annex.” Such declarations automatically cease to have effect as soon as the state in question becomes a party to a particular anti-terrorism conven-

Hostages, adopted by the United Nations General Assembly on Dec. 17, 1979; the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on Mar. 3, 1980; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on Feb. 24, 1988; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on Mar. 10, 1988; and the International Convention for the Suppression of Terrorist Bombings, adopted by the United Nations on Dec. 15, 1997.

¹⁰⁴ The two universal conventions excluded from the Annex to the 1999 Terrorist Financing Convention are the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on Sept. 14, 1963, and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on Mar. 1, 1991.

¹⁰⁵ See Aust, *supra* note 61, at 297.

tion. Conversely, “[w]hen a State party ceases to be a party to a treaty listed in the annex, it *may* make a declaration as provided for [in Article 2(2) (a)], with respect to that treaty.”¹⁰⁶

The two major stumbling blocks to an agreed definition of terrorism have been, first, the argument that any definition of terrorism should include the use of armed force by states against civilians¹⁰⁷ and, secondly, the argument that—in the words of the Jordanian declaration on ratifying the 1999 Terrorist Financing Convention—“acts of national armed struggle and fighting foreign occupation in the exercise of [a] people’s right to self-determination” are not to be regarded as terrorist acts.¹⁰⁸

With regard to the right of states to use armed force against civilians the U.S. instrument of ratification included an “understanding” that nothing in the Terrorist Financing Convention precluded any state party to the Convention “from conducting any legitimate activity against any lawful target in accordance with the law of armed conflict.”¹⁰⁹

The attempt by Jordan to exclude the activities of national liberation movements from the definition of terrorism has been the subject of objections from (to date) 16 states.¹¹⁰ The common basis of the objections is that the declaration made by Jordan is, in fact, a reservation that seeks to limit the scope of the Terrorist Financing

¹⁰⁶ Art. 2(2) (b) (emphasis added). *See also* the Informal summary of the discussions in the Working Group, *supra* note 70, at paras. 76–78.

¹⁰⁷ Particularly the acts of military aggression committed by the Israeli government against Palestinian civilians in the occupied territories.

¹⁰⁸ *See also* the Informal summary of the discussions in the Working Group, *supra* note 70, at para. 81.

¹⁰⁹ The U.S. instrument of ratification *also* declared that “[t]he United States of America also understands that the term ‘armed conflict’ does not include internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.”

¹¹⁰ Austria, Belgium, Canada, Denmark, Finland, France, Germany, Hungary, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom and the United States of America.

Convention on a unilateral basis and is therefore contrary to the object and purpose of the Convention. The objecting states also refer to Article 6 of the Terrorist Financing Convention that provides that, when adopting domestic measures to comply with their obligations under the Convention, each state party to the Convention is required "to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic or other similar nature." The objecting states expressly state that their objection shall not preclude the entry into force of the Terrorist Financing Convention between the relevant objecting state and the Hashemite Kingdom of Jordan.

Reservations that are contrary to the object and purpose of a treaty are impermissible under both customary international law¹¹¹ and Article 19(c) of the 1969 Vienna Convention on the Law of Treaties. According to the International Court of Justice in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), the effect of a reservation that is contrary to the object and purpose of a Convention and which has been objected to by one or more of the parties to the Convention in question is that the state making the reservation cannot be regarded as a party to the Convention.¹¹² Thus, if the Jordanian declaration is indeed contrary to the object and purpose of the Terrorist Financing Convention, Jordan cannot be regarded as a party to the Convention unless the Terrorist Financing Convention is to be regarded as analogous to a human rights treaty where state practice suggests that reservations that are contrary to the object and purpose of the treaty are severable.¹¹³

¹¹¹ See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), 1951 I.C.J. 15, at 29–30.

¹¹² *Id.*

¹¹³ See *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1988) and *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) (1995). See also Human Rights Committee, *General Comment No. 24 on Issues Relating to Reservations Made to the ICCPR*, U.N. Doc. CCPR/C/21Rev.1/Add.6 (1994), reproduced in 34 I.L.M. 839 (1995).

However, if the Jordanian reservation is not contrary to the object and purpose of the Terrorist Financing Convention—a notoriously difficult determination to make¹¹⁴—then the position is rather more nuanced. Articles 2(2)(a) and 24(2) of the Terrorist Financing Convention expressly permit declarations and reservations with respect to; first, the applicability of the treaty to unratified treaties in the annex in the convention and, secondly, the compulsory jurisdiction of the International Court of Justice, respectively. It might be argued that the inclusion of a right of reservation in relation to two of the provisions of the Terrorist Financing Convention is an implied exclusion of the right to make reservations with regard to other articles of the Terrorist Financing Convention.¹¹⁵ However, Article 19(a) of the Vienna Convention on the Law of Treaties permits states to formulate a reservation unless the reservation is prohibited by the treaty. The use of the word *prohibited* in Article 19(a) implies that any exclusion of the right to formulate a reservation must be express. Further the view of the objecting states that the Jordanian reservation does not preclude the entry into force of the Terrorist Financing Convention between them and the Hashemite Kingdom of Jordan implies that the objecting states regard the Jordanian reservation as—at least—potentially effective subject to the provisions of Article 21(3) of the Vienna Convention on the Law of Treaties.¹¹⁶

¹¹⁴ See Jan Klabbers, *Some Problems Regarding the Object and Purpose of Treaties*, 8 FINNISH Y.B. INT'L L. 138–60 (1997).

¹¹⁵ Applying the maxim *expressio unius est exclusio alteris* as a general principle of law recognized by all civilized nations. See *The Wimbledon Cas*, PCIJ Reports, ser. A, No. 1, at 23–4. See also LORD MCNAIR, *THE LAW OF TREATIES* 399–410 (1961) and John Mark Keyes, *Expressio unius: The expression that proves the rule*, 10 STATUTE L. REV. 1–25 (1989).

¹¹⁶ For a discussion of the effect of Article 21(3) of the Vienna Convention on the Law of Treaties on reservations to which another state has objected but stated that the objection “shall not preclude the entry into force of the Convention” between the two states, see the *Anglo-French Continental Shelf* case, reproduced in 18 I.L.M. 397 at para. 61 (1979) of the arbitral award.

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c. Conclusion

The definition of terrorism in Article 2 of the 1999 Terrorist Financing Convention has been hailed as a model definition that should assist in the completion of the negotiations on a comprehensive convention on terrorism.¹¹⁷ In *Suresh v. Canada (Minister of Citizenship and Immigration)*¹¹⁸ the Supreme Court of Canada held that “this definition catches the essence of what the world understands by ‘terrorism’.”¹¹⁹

C. THE ROLE OF THE SECURITY COUNCIL IN COMBATting TERRORIST FINANCING IN THE WAKE OF THE EVENTS OF 9/11

1. Introduction

Even prior to 9/11—in 1999—the Security Council had called upon all states, *inter alia*, to take appropriate measures to prevent and suppress in their territories, through all lawful means, the preparation and financing of any acts of terrorism and to deny safe haven to those who finance terrorist acts by securing their apprehension and prosecution or extradition.¹²⁰

On September 12, 2001—in the wake of the horrifying attacks in New York, Washington D.C. and Pennsylvania on September 11, 2001—the Security Council called on all states to work together to bring to justice, *inter alia*, “the sponsors” of the 9/11 attacks¹²¹ and, on September 28, 2001, the Security Council unanimously adopted Security Council Resolution 1373 (2001)—a wide-ranging anti-terrorism resolution that called on all states to suppress terrorist financing, improve cooperation to combat international terrorism and created a committee to monitor the implementation of the resolution.¹²²

¹¹⁷ See *A more secure world: Our shared responsibility*, *supra* note 24, at paras. 163–164.

¹¹⁸ 2002 SCC 1, [2002] 1 SCR 3.

¹¹⁹ *Id.* at para. 98. See also Antonio Cassese, *Terrorism as an International Crime*, in BIANCHI ED., *supra* note 21, at 213–25.

¹²⁰ S.C. Res. 1269, Oct. 19, 1999, U.N. Doc. S/RES/1269 (1999).

¹²¹ S.C. Res. 1368, Sept. 12, 2001, U.N. Doc. S/RES/1368 (2001).

¹²² S.C. Res. 1373, Sept. 28, 2001, U.N. Doc. S/RES/1373 (2001).

2. Security Council Resolution 1373 and the Suppression of Terrorist Financing

a. Introduction

Paragraph 1 of Security Council Resolution 1373 (2001) declares that the Security Council—acting under Chapter VII of the U.N. Charter—decides that all states shall

- (a) Prevent and suppress the financing of terrorist acts;
- (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
- (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

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(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

The question whether the Security Council possesses the power to legislate in this manner is considered in greater detail elsewhere in this volume.¹²³ Although the terrorist financing aspects of S.C. Resolution 1373 (2001) were based on the relevant provisions of the Terrorist Financing Convention, the key characteristic of treaty obligations is that states have consented to being bound by them. It is also worth noting that the compliance costs of implementing the Security Council's diktat—both in enacting the relevant legislation¹²⁴ and in the additional monitoring of financial institutions¹²⁵—are likely to be disproportionate to any possible benefits for many states particularly the least developed countries (LDCs). Although technical support is increasingly becoming available from a range of international and regional organizations, this usually only partially mitigates the costs involved for developing countries in implementing their obligations under S.C. Resolution 1373 (2001).

b. *The Counter-Terrorism Committee*

Paragraph 6 of S.C. Resolution 1373 (2001) established the Counter-Terrorism Committee (CTC) consisting of all 15 members of the Security Council to monitor the implementation of the resolution

¹²³ See Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, in EDEN & O'DONNELL EDS., *supra* note 47, at ***.***. But see also Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002).

¹²⁴ See generally, *Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting*, *supra* note 77. The creation of this handbook is a laudable acknowledgement of the need for technical legal assistance to reduce the burden on IMF member countries preparing terrorist financing legislation in order to comply with their international obligations.

¹²⁵ See Financial Action Task Force, *Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 8 Special Recommendations* (Feb. 27, 2004), available at http://www1.oecd.org/fatf/pdf/Meth-2004_en.PDF.

and called “upon all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable proposed by the Committee, on the steps they have taken to implement this resolution.” The work of the Counter-Terrorism Committee is considered in greater detail elsewhere in this volume¹²⁶ but it is worth noting that the problems encountered by the Counter-Terrorism Committee itself, as well as by states, in implementing S.C. Resolution 1373 (2001), have necessitated the passing of a further Security Council resolution¹²⁷ in order to “revitalize” the Counter-Terrorism Committee. Another comprehensive review of the work of the Counter-Terrorism Committee is scheduled to take place before the end of 2005¹²⁸ notwithstanding the fact that the Counter-Terrorism Committee Executive Directorate (CTED) is not expected to become fully operational before the end of 2004.¹²⁹

3. Conclusion

On October 8, 2004, the Security Council, acting under Chapter VII of the Charter of the United Nations, unanimously adopted S.C. Resolution 1566 (2004).¹³⁰ This resolution—reaffirming the imperative need to combat terrorism in all its forms and manifestations by all means, in accordance with the Charter of the United Nations and international law—directed the Counter-Terrorism Committee, *inter alia*, to facilitate the provision of technical and other assistance in order to enhance the implementation of Resolution 1373 (2001).¹³¹

¹²⁶ See Eric Donnelly, *Raising Global Counter-Terrorism Capacity: The Work Of The Security Council's Counter-Terrorism Committee*, in EDEN & O'DONNELL EDS., *supra* note 47, at ***-***. See also Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333–41 (2003) and Curtis A Ward, *Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council*, 8 J. CONFLICT & SEC. L. 289–305 (2003).

¹²⁷ S.C. Res. 1535, Mar. 26, 2004, U.N. Doc. S/RES/1535 (2004).

¹²⁸ See para. 2 of S.C. Res. 1535.

¹²⁹ See para. 12 of the letter dated Nov. 15, 2004, from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2004/914 (2004).

¹³⁰ S.C. Res. 1566, Oct. 8, 2004, U.N. Doc. S/RES/1566 (2004).

¹³¹ *Id.*, para. 8.

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S.C. Resolution 1566 (2004) establishes a working group to consider and submit recommendations to the Security Council on practical measures to be imposed upon individuals, groups or entities involved in or associated with terrorist activities including more effective procedures to freeze their financial assets.¹³² The resolution also mandates the working group “to consider the possibility of establishing an international fund to compensate victims of terrorist acts and their families, which might be financed through voluntary contributions, which could consist in part of assets seized from terrorist organizations, their members and sponsors.”¹³³

D. CONCLUSION

The truck packed with ammonium nitrate and fuel oil, which destroyed the Alfred P. Murrah Federal Building in Oklahoma City in April 1995 causing the death of 168 people (including 19 children),¹³⁴ is a stark reminder that private individuals are entirely capable of committing terrorist acts without recourse to funding (whether state or private).¹³⁵ However, the Oklahoma City bombing is generally regarded as the exception, and conventional wisdom holds that funding is “the lifeblood of terrorism of all types”¹³⁶ and that efforts to combat terrorist financing are a vital aspect of the current “war against terrorism.” In 2003 the International Bar Association’s Task Force on International Terrorism challenged this conventional wisdom and asserted that “it should not be assumed that all terrorist acts can be prevented by blocking funds belonging to or intended for terrorists.”¹³⁷

¹³² *Id.*, para. 9.

¹³³ *Id.*, para. 10.

¹³⁴ See <http://www.cnn.com/US/9703/okc.trial/> for coverage of the Oklahoma City bombing trials.

¹³⁵ As the Oklahoma City bombing was committed within a single state, the alleged offenders and the victims were nationals of that state and the alleged offenders were all found in the territory of that state, the bombings fell outside the scope of the 1997 International Convention for the Suppression of Terrorist Bombings—see art. 3 of the Terrorist Bombing Convention.

¹³⁶ Lavalley, *supra* note 75, at 492.

¹³⁷ The International Bar Association’s Task Force on International Terrorism 2003 Report, *supra* note 24, at xxvi.

Unfortunately, it is far from easy to distinguish a legitimate financial transaction from terrorist or other illegitimate financial activity unless one of the parties involved in the financial transaction is a known or suspected terrorist or terrorist organization and “acts of terrorism do not necessarily require large sums of money or involve specific forms of transaction which attract the attention of financial institutions.”¹³⁸

In the unlikely event that it came to be accepted that the international measures to prevent and suppress the financing of terrorism were largely ineffective with regard to their primary purpose, it might still be possible to defend such measures on the grounds that they help strengthen the fight against money laundering (by terrorists and non-terrorists alike). While the principle of double effect might be invoked to justify efforts to tackle terrorist financing,¹³⁹ it should also be remembered that “[i]nternational efforts to eradicate terrorism have unfortunately led some states to implement measures which can significantly erode the rights of individuals.”¹⁴⁰

Notwithstanding the various instruments, policies and procedures discussed in this chapter, the Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change recently stated

¹³⁸ *Id.* at 118.

¹³⁹ The principle of double effect seeks to provide specific guidelines for determining when it is morally permissible to perform an action in pursuit of a good end in full knowledge that the action will also bring about bad results. Classical formulations of the principle of double effect require four conditions to be met if the action in question is to be morally permissible. First, the action contemplated must be in itself either morally good or morally indifferent. Secondly, the bad result must not be directly intended. Thirdly, the good result must not be a direct causal result of the bad result. Fourthly, the good result must be “proportionate to” the bad result. Supporters of the principle argue that, in situations of “double effect” where all these conditions are met, the action is morally permissible despite the bad result. See generally P.A. WOODWARD ED., *THE DOCTRINE OF DOUBLE EFFECT* (2001) (a recent anthology of philosophical essays providing a convenient in-depth introduction to the principle of double effect).

¹⁴⁰ The International Bar Association’s Task Force on International Terrorism 2003 Report, *supra* note 24, at xxvi.

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that the attempts to address the problems of terrorist financing have been inadequate.¹⁴¹ According to the High Level Panel

While in the three months after 11 September 2001 \$112 million in alleged terrorist funds were frozen, only \$24 million were frozen in the two years that followed. Seized funds represent only a small fraction of total funds available to terrorist organizations. While many States have insufficient anti-money-laundering laws and technical capacity, the evasion techniques of terrorists are highly developed and many terrorist funds have a legal origin and are hard to regulate.¹⁴²

The High Level Panel strongly recommends¹⁴³ that states should adopt the eight Special Recommendations on Terrorist Financing issued by the Organization for Economic Cooperation and Development (OECD)-supported Financial Action Task Force (FATF) on Money Laundering and the measures contained in its various best practices papers. It should be noted however that the High Level Panel also recommends that the “war against terrorism” should involve a comprehensive strategy that includes measures aimed at the root causes of terrorism and that pays due regard to civil liberties and human rights.¹⁴⁴

¹⁴¹ *A more secure world: Our shared responsibility*, *supra* note 24, at para. 149.

¹⁴² *Id.*

¹⁴³ *Id.* at para. 150.

¹⁴⁴ *Id.* at para. 148.